90-1725

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 9, 1991

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit misapplied this Court's decisions in *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) and *Department of Treasury, I.R.S. v. Federal Labor Relations Board*, 110 S.Ct. 1623, 1629-30 (1990), when it deferred to a definition of "public bodies" under the Niagara Redevelopment Act (NRA or the Act), 16 U.S.C. § 836(b)(1), adopted by the Federal Energy Regulatory Commission (FERC or the Commission) on the mistaken assumption that its definition was mandated by the Second Circuit's own decision in an earlier case?

2. Whether the Commission's holding that the State of Vermont's Department of Public Service (VDPS) was not a "public body" under the NRA (and therefor ineligible for cheap hydroelectric "preference power") because it did not physically control the operation of distribution facilities, was inconsistent with the plain language and intent of the Act?

3. Whether the Commission's "public bodies" definition serves to disqualify governmental agencies (like VDPS) which satisfy the intent of the NRA and is therefore arbitrary and capricious?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the Second Circuit are those in the caption, and, as petitioners: Allegheny Electric Cooperative, Inc., New York City Pubic Utility Service, Upstate Public Utility Services Association, County of Westchester Public Utility Service Agency, James E. O'Neil, Attorney General of the State of Rhode Island and the Rhode Island Public Utilities Commission, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company, and Power Authority of the State of New York. New York City Public Utility Service and the County of Westchester Public Utility Service Agency are petitioning this Court separately for a writ of certiorari.

As intervenors: Allegheny Electric Cooperative, Inc., Municipal Electric Utilities Association of New York State, Public Power Association of New Jersey, New York State Electric & Gas Corporation, City of Cleveland Ohio, Public Service Electric & Gas Company, City of New York, Port Authority of New York and New Jersey, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Vermont Department of Public Service, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on December 17, 1990, in which rehearing was denied on February 12, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals (1-24a)[1] is reported at 922 F.2d 73. The opinions of the Federal Energy Reg-

[1] The opinion is reprinted in the Appendix to the Petition for Writ of Certiorari. The Appendix is jointly filed by petitioner herein, the Vermont Department of Public Service, and by New York City Public Service and the County of Westchester Public Utility Service Agency which petition separately for review by this Court. Citations to the Appendix are made to the page number therein as "(___ a)". Materials not included in the Appendix appended hereto but which appeared in the Joint Appendix filed in the Court of Appeals shall be referred to as "___ A, Vol. ___". "R. ___" refers to the record below.

ulatory Commission (FERC or Commission) are reported at 48 FERC ¶ 61,124 (1989) (64-109a) and 49 FERC ¶ 61,068 (1989) (110-114a) (Opinion Nos. 329 and 329-A).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Niagara Redevelopment Act, 16 U.S.C. § 836 (116-119a); Section 313 of Federal Power Act, 16 U.S.C. § 8241(b).

STATEMENT OF THE CASE

The Court of Appeals affirmed two FERC orders holding that the State of Vermont's Department of Public Service (Vermont or VDPS) is not a public body within the meaning of the Niagara Redevelopment Act (NRA or Act), 16 U.S.C. § 836 (116-119a), and therefore is no longer eligible to purchase inexpensive hydroelectric "preference power" from the Niagara River Project licensed to the Power Authority of the State of New York (PASNY).[2]

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[2] PASNY is a political subdivision of New York State and is responsible for the hydroelectric development of the Niagara and St. Lawrence Rivers. The NRA authorized and directed the Federal Power Commission, predecessor to the FERC, to issue a license under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, to PASNY for the construction and operation of the Niagara hydroelectric power project, 16 U.S.C. § 836(a) (116a), which license issued in 1957. *Power Authority of the State of New York*, 18 FPC 344 (1957).

The NRA requires that in disposing of 50% of the Niagara project power, PASNY "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance." 16 U.S.C. § 836(b)(1) (116a). Article 21 of the license, in turn, requires that PASNY make up to 20% of the "preference power" available "for use within reasonable economic transmission distance in neighboring States" (*i.e.*, outside New York). *Power Authority of the State of New York*, 18 FPC at 347. It is the allocation of preference power to "neighboring states" that is at issue in this case.

A. VDPS' Historic Reliance on Niagara Power

The Niagara Project went into service in 1961 with almost no takers for the "preference power" reserved by Congress "for the benefit of the people as consumers, particularly domestic and rural consumers". 16 U.S.C. § 836(b)(2) (116-117a). The significant exception was Vermont, which began buying large quantities of preference power in 1962 through the predecessor to the VDPS. *Power Authority of the State of New York v. FERC*, 743 F.2d 93, 99 (2d Cir. 1984) (*PASNY*).

For over 20 years, Vermont's right to preference power was either undisputed, or explicitly recognized, as in *State of Vermont Public Service Board v. PASNY*, 55 FPC 1109, 1113 (1976) (*VPSB*). However, PASNY's long-term contracts for the sale of preference power were set to expire on June 30, 1985. 2878-9A, 2900-1A, Vol. IX. In anticipation of that event, PASNY held hearings during the fall of 1983, resulting in an out-of-state allocation decision in January 1984. 2901A, Vol. IX. On March 26, 1985, the out-of-state preference power contracts, including one with VDPS, were approved by the Trustees. 2901A, Vol. IX.

B. FERC Changes Direction

During the same period, FERC conducted hearings in which challenges were raised to the holding in *VPSB* that VDPS qualified as a public body. Following those hearings, FERC issued Opinion No. 229, reversing a decision by its Administrative Law Judge (ALJ) as well as its earlier holding in *VPSB*.[3] Eschewing a literal reading of the term "public bodies", it found that VDPS was not an NRA

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[3] *Massachusetts Municipal Wholesale Electric Company and Connecticut Municipal Electric Energy Cooperative v. Power Authority*, 30 FERC ¶ 61,323 at 61,651 (1985) (Opinion No. 229), *clarified and reh'g den.*, 32 FERC ¶ 61,194 (1985) (Opinion No. 229-A), *aff'd, Metropolitan Transportation Authority v. FERC*, 796 F.2d 584 (2d Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) (*MTA*).

public body because it was selling preference power to private utilities at wholesale instead of selling directly to customers at retail and therefore could not provide yardstick competition to private utilities as Congress had intended. Opinion No. 229, 30 FERC at 61,651.

Following Opinion No. 229, Vermont enacted legislation ("1985 law") "aimed at satisfying the Commission's newly articulated 'public body' test." 922 F.2d at 78 (8a). The 1985 law empowered VDPS to sell power from the Niagara and St. Lawrence projects at retail and authorized it to lease the use of private utility distribution lines to accomplish that end. *Id.* (8a). VDPS implemented the new statute by entering into agreements with all utilities in Vermont, both public and private. It also acquired an undivided leasehold interest in the various distribution systems and contracted for the furnishing of incidental services such as meter reading and billing by the utilities as independent contractors. *Id.* (8a); Opinion No. 329, 48 FERC at 61,474 (101a). VDPS also sought rehearing of FERC's opinion, urging it to clarify that ownership of distribution facilities was not a prerequisite to achieving public body status.

On rehearing, FERC explained that its reference to ownership was "inadvertent" and that ownership of distribution facilities had never been a requirement to qualify for preference power.[4] Opinion No. 229-A, 32 FERC at

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[4] FERC relied on an earlier ALJ decision, *Town of Massena v. Niagara Mohawk Power Corporation and the Power Authority of the State of New York*, 13 FERC ¶ 63,036 (1980), *complaint withdrawn and decision vacated as moot*, 20 FERC ¶ 61,406 (1982). The *Massena* decision had concluded that neither ownership nor control of distribution facilities was necessary to be engaged in retail distribution of electricity. 13 FERC at 65,147. As discussed, *infra*, FERC's subsequent holding in the case now before this Court that such control *is* necessary to qualify as a public body is a central issue in Vermont's petition.

61,451 n.12. It then left to PASNY, "in the first instance", to determine whether VDPS, under the 1985 law, would qualify as a public body. *Id.*[5]

On June 25, 1985, PASNY included VDPS in the preference power allocations to the seven neighboring states of Vermont, Pennsylvania, Ohio, New Jersey, Massachusetts, Connecticut and Rhode Island. 2903A, Vol. IX.

On June 13, 1986, FERC ordered an evidentiary hearing on complaint filed by the Massachusetts Municipal Wholesale Electric Company (MMWEC) and the Connecticut Municipal Electric Energy Cooperative (CMEEC) challenging PASNY's determination that VDPS was a public body under the 1985 law. *See, Municipal Electric Utilities Assoc. of N.Y. State v. Power Authority of the State of N.Y.*, 35 FERC ¶ 61,333 at 61,758 (1986).[6]

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[5] VDPS was not a petitioner in the *MTA* case and the court held that it was not ruling on whether VDPS would qualify for preference power under the 1985 law. *MTA*, 796 F.2d at 591. The court further held that giving preference power to VDPS, as constituted prior to enactment of the 1985 law, would run counter to the purpose of the NRA. The Court relied on its earlier decision in *PASNY*, 743 F.2d at 105, that the Congressional intent of the NRA preference provision was to promote "yardstick competition":

> . . . [M]unicipal utilities, Congress hoped, would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return. Yardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers. If the "public body" used the preference power itself, the privately-owned utilities would not face any pressure to reduce the prices they charge other customers. Similarly, if the "public body" simply resold the preference power to the privately-owned utilities (as did VDPS) the preference power would not have fostered competition.

MTA, 796 F.2d at 592, citations omitted.

[6] A similar complaint was filed by the Municipal Electric Utility As-

C. FERC Relies on MTA

Following hearings during which the FERC staff witness agreed that VDPS promotes yardstick competition, 254A, 312-13A, Vol. I; 585A, Vol. II, the ALJ found that VDPS is not only "a factor in the electric power industry in the state" (*Municipal Electric Utilities Assoc. of N.Y. State v. Power Authority of the State of N.Y.*, 42 FERC ¶ 63,018 at 65,172 (1988) (*I.D.*) (60a)) but also that, "unlike the [New York] MDAs, it plays a major role in the supply of electric energy." *Id.* at 65,171 (58a). However, the ALJ decided that neither VDPS nor the MDAs were public bodies eligible to receive preference power. *Id.* at 65,173 (63a). In making that finding, the ALJ stated that the use of leasing agreements does not in itself make a public entity ineligible for the receipt of preference power. He continued that a publicly-owned entity can satisfy the "public body" test via lease if it meets certain criteria. *Id.* at 65,164-165 (41-42a).

The ALJ stated that to provide "yardstick competition" the entity must provide both consumers and regulators with a "benchmark" with which to compare the rates and quality of service offered by private utility companies. The ALJ set forth a three step analysis to determine whether an entity provides yardstick competition. To provide yardstick competition a public body must: 1) provide a threat of displacement to private utilities, 2) substantially meet the requirements of its customers, and 3) provide consumers an opportunity for rate comparisons. *Id.* at 65,164

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sociation of New York State (MEUA) against certain municipal distribution agencies (MDAs) in New York. The two complaints were consolidated for hearing in the above cited order. MEUA and CMEEC/MMWEC are associations of public entities that had been receiving preference power. By their complaints, they hoped to reduce the number of entities receiving preference power so that their own allocation of inexpensive preference power would be increased.

(40-41a). VDPS was found to meet only the second of these criteria. *Id.* at 65,171-172 (60a).[7]

Central to the ALJ's decision was his further conclusion, later reiterated and adopted in Opinion No. 329,[8] that in order "to sell and distribute power at retail" as required under Opinion No. 229 (affirmed in *MTA*), a public body would have to possess control of a distribution system "without restraint". *I.D.* at 65,165 (43a); Opinion No. 329, 48 FERC at 61,467 (88a).

With regard to VDPS, the ALJ concluded that it "came closer" than the MDAs to satisfying the "public body" test because it has the ability to provide its service to virtually any resident of Vermont upon request. *I.D.* at 65,171-172 (60a). But, relying principally on his control criterion, he concluded that VDPS, which contracted with private utilities for billing, meter reading, and delivery of the power to VDPS' customers, lacked the requisite control of distribution facilities and distribution costs or direct responsibility to its customers. *I.D.* at 65,172 (60-61a).

In Opinion No. 329, FERC adopted the ALJ's decision in its entirety and disqualified the MDAs and VDPS as "public bodies". Opinion No. 329, 48 FERC at 61,478 (108a). In adopting the ALJ's criteria for a public body, FERC stated that it was merely following, *inter alia*, the Second Circuit's holding in *MTA* that "public bodies" are "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *MTA*, 796 F.2d at 593; *see*, Opinion No. 329, 48 FERC at 61,466 (86a). More specifically, FERC believed itself bound by *MTA* to the control criterion. FERC ruled

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[7] The ALJ took official notice of, but then declined to consider a 1987 Vermont statute (30 V.S.A. § 211, *et seq.*), that, *inter alia*, mandated rate comparisons on customer bills. *I.D.* at 65,170 (57a); Opinion No. 329, 48 FERC at 61,472 n.57 (96-97a).

[8] 48 FERC at 61,467 (88a).

that, as it read *MTA*, the Second Circuit's interpretation of the legislative history of the NRA "*requires* that the 'public body' *must* control distribution." Opinion No. 329, 48 FERC at 61,466 (86a) (emphasis added).

On rehearing, VDPS argued, *inter alia*, that despite explicitly relying on *MTA*, FERC had disregarded the Second Circuit's express holding that a regulatory yardstick is a form of yardstick competition (*MTA*, 796 F.2d at 592) when it ruled that the regulatory yardstick VDPS provided would not establish the existence of yardstick competition. *See*, Opinion No. 329, 48 FERC at 61,467 (88a).

As to FERC's requirement that a public body obtain operational control of distribution facilities "without restraint" in order to insure "continuity of service," *see*, 922 F.2d 79 (10a), VDPS pointed out that FERC's position was not mandated by the *MTA* decision and further made no sense in light of the fact that control of generation and transmission services, which are both equally necessary for continuity of service, was not required. VDPS also argued that the required level of control was tantamount to the ownership criterion that the Commission claimed to reject. Access to, and use of distribution facilities, not operational control, is all that is necessary to render the public body capable of supplying the power directly to the customers it undertakes to serve. VDPS finally argued that the Commission ignored extensive evidence that retail suppliers of power, like those of gas and telecommunication services, can and do provide service to ultimate consumers by relying on distribution facilities under the operational control of their competitors.

The Commission denied Vermont's request for rehearing without discussion by order dated October 19, 1989. Opinion No. 329-A, 49 FERC ¶ 61,068 (1989) (110-114a).

D. The Second Circuit Defers to FERC

The Court of Appeals issued its decision upholding Order Nos. 329 and 329-A on December 17, 1990. *See, Allegheny*

Electric Cooperative, Inc. v. FERC, 922 F.2d 73 (2d Cir. 1990) (1-24a). The court found VDPS and the other petitioners below correct in noting that the NRA itself does not impose "the strict standards" adopted and that prior case law, including *MTA*, had not expressly imposed those eligibility criteria either. 922 F.2d at 81 (14a). However, the court deferred to FERC, although noting that it might not have adopted "these exact criteria." *Id.* at 82 (16a). The court did not address Vermont's argument that because FERC erroneously believed its control criterion was *mandated* by the *MTA* case, the agency had not exercised its own discretion and that deference to FERC's decision therefore was not appropriate. Instead, relying heavily on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), the court held that unless FERC's interpretation is inconsistent with the plain language of the statute, or with the intent of Congress, it would defer to the Commission's construction as long as it was "reasonable". *Id.* at 80, 81, 82 (12, 14, 16a).

Applying *Chevron*, the court then found Vermont's and other petitioners' arguments that through their leasing arrangements they possess the capability to distribute power at retail, thus satisfying the definition of "public body" adopted in *MTA*, unavailing. It also rejected the contention that the Commission misapplied the principle of "yardstick competition." In affirming FERC's ruling that public bodies could not provide yardstick competition unless they maintained separate control of distribution costs, *id.* at 85 (21a), the Court rejected Vermont's argument that FERC's test effectively mandates the distribution facilities ownership requirement the agency had itself claimed to eschew.

REASONS FOR GRANTING THE PETITION

A. The Issue Is Important

The Court of Appeals' decision deferring to FERC's definition of "public bodies" under the NRA misconstrues, in three respects, the obligation of a reviewing court under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *Department of Treasury, I.R.S. v. Federal Labor Relations Authority*, 110 S.Ct. 1623, 1629-30 (1990). First, the court ignored the fact that FERC relied not on its own analysis of the NRA, but on an incorrect reading of the Second Circuit's interpretation of the Act in *MTA* and is therefore not entitled to deference. Second, assuming any deference to the statutory construction of an administrative agency was due in this case, the court incorrectly assumed that deference was due FERC, the reviewing agency, rather than PASNY, the licensee under act of Congress charged with administering the NRA's preference provisions. *See*, 16 U.S.C. § 836(b)(1) (116a). Third, it erred in applying full deference to an agency whose interpretation of the statute has changed several times. Given the development of the law under *Chevron*, including the recent decision in *Secretary of Labor v. Occupational Safety and Health Review Commission*, No. 89-1541, 59 U.S.L.W. 4197 (March 20, 1991) (*OSHRC*), these issues are worthy of the Court's consideration.

B. There Is A Conflict Among the Courts of Appeals

In several recent cases, the Court of Appeals for the District of Columbia Circuit has held that where an agency mistakenly believes its construction of a statute is mandated by prior cases, it has not exercised its discretion and therefore is not entitled to deference under *Chevron*. *See, Phillips Petroleum Corp. v. FERC*, 792 F.2d 1165, 1169 (D.C. Cir. 1986); *Prill v. NLRB*, 755 F.2d 941, 956-58 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985). Here, FERC believed its requirement that "public bodies" con-

trol distribution facilities was mandated by an earlier decision of the Second Circuit. Then, the Second Circuit held that FERC's definition was not mandated by the statute or prior case law, but deferred to the agency anyway. By deferring to FERC, the court adopted an approach entirely at odds with that of the D.C. Circuit.

C. The Erroneous Decision Below Will Have Broad Precedential Ramifications

The Court of Appeals erred in two other respects. First, even assuming FERC's decision had been based on its own interpretation of the NRA, its holding that the State of Vermont's Department of Public Service is not a "public body" strayed so far from the plain text of the Act, the decisions of the licensee, *PASNY*, FERC's prior decisions, and the court's own prior interpretation of the Act's clear purpose that the court's decision to grant deference was once again an abdication of its obligation to review. Second, the court erred in affirming FERC's determination that a public body must control distribution facilities without a showing from the agency that such a requirement was either necessary to carry out, or consistent with, the intent of the Act.

If allowed to stand, the decision will unlawfully deprive the State of Vermont, after almost three decades of reliance, of its statutory entitlement to cheap hydroelectric preference power at a cost to its electric consumers of more than $10 million annually. Moreover, the impact of this decision will not be confined to the parties to this case. Beyond the *Chevron* issues, there are a number of federal laws establishing preferences to cheap hydropower for states, municipalities and other public bodies.[9] A di-

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[9] *See, e.g.*, Boulder Canyon Project Act of 1928, 43 U.S.C. § 617(d)(c); Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831(i); Bonneville Project Act of 1937, 16 U.S.C. § 832c; Reclamation Project Act of 1939, 43 U.S.C. § 620c; Flood Control Act of 1944, 16 U.S.C. 825s. The

vided panel decision of the Tenth Circuit—to which a number of national organizations were parties or amici—recently upheld an agency determination that the preference for "municipalities" under the Reclamation Act of 1939 extends only to municipalities which maintain "utility responsibility." *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991), *reh'g denied* (April 18, 1991) (*Salt Lake City*)[10] In these circumstances the Court of Appeals' decision not only contravenes *Chevron*, but would have substantial precedential impact. Therefore, review by this Court is warranted.

ARGUMENT

I. *CHEVRON* IS INAPPLICABLE WHERE THE AGENCY HAS NOT EXERCISED ITS OWN DISCRETION BUT MERELY HAS FOLLOWED AN ERRONEOUS BELIEF THAT IT WAS BOUND BY A PRIOR COURT DECISION.

Under *Chevron*, an agency charged with administering an ambiguous statute is entitled to deference from a reviewing court where, in the exercise of its discretion, the agency interprets the statute reasonably. In this case, the court relied heavily on *Chevron*, but did so incorrectly. First, FERC never exercised its discretion, erroneously believing its application of the NRA was mandated by a prior decision of the Second Circuit—*MTA*. Thus, *Chevron* is inapplicable. Second, assuming *Chevron* is applicable at all, it is not FERC that has the initial responsibility under the NRA to determine what entities qualify for preference power. That role is PASNY's and PASNY determined that

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Second Circuit has held that the NRA, like the other preference laws cited, establishes "the usual federal preference." *PASNY*, 743 F.2d 93, 105. Accord, *MTA*, 796 F.2d at 592, n.7.

[10] In that case, the majority ruled that the agency (Western Area Power Administration or WAPA) was entitled to deference under *Chevron*. Judge Taha, dissenting, maintained that WAPA's requirement was inconsistent with the plain language of the Act. *Salt Lake City*, 926 F.2d at 985.

VDPS is a public body. Under *OHSRC, supra*, PASNY was entitled to deference, not FERC. Third, assuming any deference was due FERC under *Chevron*, because FERC's result conflicted with its precedent, it was entitled to considerably less deference than accorded by the Court of Appeals. *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 446, n.30, 107 S.Ct. 1207, 1221 n.30 (1987) (*Cardoza*).

A. FERC's Reliance on MTA Prohibits Chevron Deference

The key determinant of public body status under FERC Opinion No. 329 is whether the public entity has complete operational control of distribution facilities. Opinion No. 329, 48 FERC at 61,467 (88a). FERC found this criterion to have originated in the Second Circuit's *MTA* decision. *MTA*, FERC stated, "*requires* that the public body *must* control distribution." Opinion No. 329, 48 FERC at 61,466 (86a) (emphasis added). Since FERC found that VDPS did not control distribution facilities, as it believed was required by *MTA*, it denied VDPS public body status. FERC's stated basis for its control criterion (and its other stated criteria as well) however, is clearly erroneous. As the Second Circuit held below, "the statute itself does not impose these strict standards and . . . prior case law has not expressly imposed such eligibility criteria." 922 F.2d at 81 (14a).

"[T]he validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination." *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 632 n.31 (1980) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)). Where the agency has been proceeding on a "mistaken assumption" about the statute, it is not for the reviewing court to supply a justification "on the agency's behalf." *Dept. of Treasury v. FLRA*, 110 S.Ct. at 1629-30 (1990). In this case, the agency's determination rests on a demonstrably faulty premise. It cannot be de-

termined from the order whether, unencumbered by its erroneous view of the law, FERC would have reached the same decision or a different one. A reviewing court, therefore, "is powerless to affirm the administrative action." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). *See also, Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962); *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983).

The D.C. Circuit Court has addressed the applicability of *Chevron* in such circumstances.[11] Relying on *Chenery*, the D.C. Circuit has on three occasions ruled that *Chevron* is inapplicable. *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169 (D.C. Cir. 1986) (*Phillips*); *Prill v. NLRB*, 755 F.2d 941, 956-58 (D.C. Cir.), *cert. denied*, 106 U.S. 313 (1985); *International Brotherhood of Electrical Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 708 (D.C. Cir. 1987). Deference under *Chevron*, the D.C. Circuit has soundly reasoned, "is only appropriate when the agency has exercised its *own* judgment. When instead, the agency's decision is based on an erroneous view of the law, its decision cannot stand." *Phillips*, 792 F.2d at 1169 (emphasis in original). What is critical is that here, as in the cited cases, the agency wrongly believed itself "bound" by prior court decisions, and that its statutory interpretation was "mandated" by them. *Phillips*, 792 F.2d at 1172. Thus, even where (as here) the agency offers additional explanation for its action, the outcome, assuming it might otherwise be sustainable,[12] is clearly tainted:

> [T]he result in a given case will often turn not only on the governing standard but also on the manner in which it is applied, and this may well

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[11] While squarely presented below, the Second Circuit did not rule on the issue.

[12] Even where *Chevron* applies, the agency's interpretation must be a reasonable one. As shown, *infra*, Section III, FERC's order fails that test.

> be influenced by whether the Board believes the standard to be dictated by the statute itself or rather adopted as a matter of policy in order to effectuate the purposes of the Act. Thus, we cannot say that the Board's error in this case has no bearing on the result reached.

Prill v. NLRB, 755 F.2d at 956-957.

The principle of deference rests on the assumption that Congress, in creating an agency and entrusting it to administer a statutory scheme, has directed the courts, implicitly or explicitly, to give weight to the agency's presumed expertise. Sunstein, *Law and Administration After Chevron*, 90 Col. L.R. 2071, 2084-91 (1990). And in this case the court below, relying on FERC's "experience and expertise", deferred to FERC. 922 F.2d at 81 (14a). The lower court's error is that the agency *itself* did not rely on its own "experience or expertise", or even undertake to interpret the statute. The result is that VDPS has been met with a circle of deference in which FERC concludes that its actions are compelled by prior decisions of the Second Circuit, the Second Circuit disagrees, but nonetheless concludes that affirmance is compelled under *Chevron*.

B. Deference, If Any, Belonged To PASNY, Not FERC

Under the NRA, FERC does not make any initial determination as to eligibility for preference power. That role is PASNY's, the licensee. "We leave it to PASNY in the first instance to determine the legality of such arrangements. We will exercise our responsibilities to resolve any disputes as they arise through the complaint process established by the NRA and the FPA." Opinion No. 229-A, 32 FERC at 61,451. In fact, FERC's role under the NRA is quite limited. Beyond its obligation to issue the license to PASNY, 16 U.S.C. § 836(a) (116a), FERC's only specific role under the NRA is to "determine and fix the applicable

portion of power to be made available and the terms applicable thereto" in the event of disagreement between the licensee and the power-marketing agencies of states neighboring New York. 16 U.S.C. § 836(b)(2) (117a).

Assuming, *arguendo*, that this task properly encompasses a review of PASNY decisions as to which entities are NRA public bodies, it is clear that FERC's role is not that of an initial fact finder. Rather, FERC's role is to review the decisions of PASNY in the event of dispute. This fact situation is similar to that presented to the Court in *OHSRC*. There, the Secretary of Labor was charged with responsibility for setting and enforcing workplace health and safety standards. In contrast, the Occupational Safety and Health Review Commission was assigned adjudicatory functions. Under such a "split enforcement" structure, this Court held that it was the decision of the Secretary that was entitled to deference (if it is reasonable) and that a reviewing court may not prefer the reasonable interpretation of the Commission to the reasonable interpretation of the Secretary. *OHSRC*, 58 U.S.L.W. at 4200-1.

The NRA's split enforcement approach obviously is not identical to that considered in *OHSRC*. However, the distinctions are insignificant to the question of deference. Consistent with *OHSRC*, the Court is requested to find that the Second Circuit erred in according FERC's decision *Chevron* deference.

C. Assuming Deference Was Due FERC's Analysis, Such Deference Should Have been Lessened Because Of FERC's Change Of View

Assuming any deference to FERC was due, the Second Circuit's accord of full deference to FERC ignored one vital fact: FERC had changed the standards under which PASNY had allocated preference power to VDPS for over

20 years with FERC's blessing. The court's error in this regard was fully explained in *Cardoza*:

> An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view. *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 1681, 68 L.Ed. 2d 80 (1981); see also *General Electric Co. v. Gilbert*, 429 U.S. 125, 143, 97 S.Ct. 401, 411-412, 50 L.Ed.2d 343 (1976).

Cardoza, supra, 480 U.S. at 446, n.30.

Here, the shifting definitions are pronounced. In 1976, in *VPSB*, FERC explicitly held that VDPS was a "public body" entitled to the preference power which it sold to private utilities, because it ensured that "all direct benefits of that power accrue to residential and rural customers within Vermont by means of PSB [Public Service Board] supervision over rates." 55 FPC at 1116. In Opinion No. 229, FERC reversed itself, necessitating changes in Vermont law to bring VDPS into compliance with the new standards prohibiting resale to private utilities. In Opinion No. 329, affirmed below, FERC added still further hurdles for VDPS. This is precisely the "inconsistency of positions" discussed in *Cardoza* and prohibits the extent of deference shown FERC by the Second Circuit.

II. EVEN ASSUMING *CHEVRON* WERE APPLICABLE, FERC'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE AND CLEAR INTENT OF THE STATUTE.

The lower court held that under *Chevron*, "[u]nless the Commission's interpretation is inconsistent with the plain language of the statute or with the intent of Congress,

we will defer to the Commission's construction as long as it is 'reasonable' ". 922 F.2d at 81 (14a). The FERC decision affirmed below, however, strays impermissibly from both "the plain language of the statute" and the "intent of Congress." FERC's failure to exercise its own judgment aside, its action creates an artificial standard which denies public body status to public entities such as VDPS which fall within both the plain language and the intent of the NRA.

Chevron, where applicable, involves a two step analysis. The court must first look to the plain meaning of the statute. Only if it determines that the statute's intent on the question presented is ambiguous does the court reach the second step of the analysis, *i.e.*, a determination whether the agency's construction is reasonable and therefore entitled to deference. *Chevron*, 467 U.S. at 842. Whether the statute is unambiguous can itself be ascertained in one of two ways. The primary source is, of course, the statute itself. If the language is plain, that normally will be the end of the inquiry, "for the Court as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Invoking "traditional rules of statutory interpretation" the court also can look to settled judicial constructions of a statute to establish its clear purpose: "Once we have determined a statute's clear meaning we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S.Ct. 2759, 2768 (1990).

The Second Circuit's conclusion that FERC's definition of public body is consistent with the plain language and intent of the NRA cannot be sustained. As to the asserted consistency with the "language and purpose" of the statute (922 F.2d at 80, 81 (13, 14a)), "[t]he trouble with this argument is that it is entirely disconnected from the text

of the statute." *Dept. of Treasury v. FLRA*, 110 S.Ct. at 1628. The lower court's ruling upholds FERC's determination that the State of Vermont is not a public body, but the "text of the statute" surely suggests otherwise. The NRA provides in relevant part simply that "to ensure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly rural and domestic customers . . . . and to encourage the widest possible use, the licensee . . . shall give preference and priority to public bodies . . . ." 16 U.S.C. § 836(b)(1) (116a). The requirement that "public bodies" control the operation of distribution facilities is neither expressed in nor implied from the words of the statute.[13]

Reliance on the NRA's intent as justification for FERC's control criterion is no more defensible. The "crystal clear" intent of the NRA, the Second Circuit previously has held, is to promote "yardstick competition" between public bodies and private utilities. *MTA*, 796 F.2d at 593. Public entities which consume power as end users, or which sell their power to private utilities at wholesale rather than "for resale to customers at retail," the Court further elaborated, could not provide yardstick competition. *MTA*, 796

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[13] Construing Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 620c, a somewhat similar provision governing preference in the sale of federal hydropower, the Tenth Circuit affirmed a lower court holding that the Western Area Power Administration (WAPA), the agency charged with administering the statute, was entitled to deference in its determination that "municipalities" would only be eligible for preference power if they assumed "utility responsibility." *Salt Lake City*, 926 F.2d at 978-979. Dissenting, Judge Taha concluded that the plain language of the Act could not sustain WAPA's interpretation:

> In my view, the Congressional intent expressed in the plain language of section 9(c) is to provide preference to municipalities simply based on their status as political subdivisions, not on their capacity to distribute power.

Id. at 985.

F.2d at 593. Congress' hope, the lower court has stated, was that public bodies:

> would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return.

MTA, 796 F.2d at 592.

It would seem obvious then that under a "clear purpose" test, governmental agencies which purchase "hydropower from [PASNY] for resale to customers at retail" (*MTA*, 796 F.2d at 593) and which "by using their supply of hydropower to charge rates which would . . . at least serve as a measure by which regulators could set the private utilities' rate of return" (*id.* at 592), would be eligible for preference power under the NRA. VDPS meets that test. The Commission did not dispute that the retail rates of VDPS are on file with and regulated by the Vermont Public Service Board (Opinion No. 329, 48 FERC at 61,473-74 (98a)), yet it found that the "appropriate ways to promote competition at retail between public utilities and IOUs" include consumer rate comparisons, but—contrary to *MTA—not* " 'regulatory' comparisons." Opinion No. 329, 48 FERC at 61,467 (88a).

In upholding the Commission's public body criteria on the basis that such criteria are consistent with the purpose of the NRA, the lower court has strained to find deference where none is due. "But deference is not abdication, and it requires [a court] to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *EEOC v. Arabian American Oil Co.*, 59 U.S.L.W. 4225, 4230 (1991) (Scalia, J., concurring). One such principle is that "[t]he plain purpose of legislation . . . is determined in the first instance with reference to the plain language of the statute itself." *Board of Governors of the Federal Reserve System v. Di-*

mension Finance Corporation, 474 U.S. 364, 373 (1986), *citing, Richards v. United States*, 369 U.S. 1, 9 (1962). In *MTA* the lower court had already gone beyond the language of the statute to determine its "plain purpose" and found that purpose achieved where—as in Vermont—the public entity provides a regulatory yardstick to private competitors. Attempts to discern the "plain purpose of legislation at the expense of the terms of the statute itself" are dubious to begin with, *Board of Governors*, 474 U.S. at 374,[14] but, rightly or wrongly, the lower court's prior determination of statutory purpose in *MTA* is to be honored on the basis of *stare decisis*. *Maislin, supra*, 110 S.Ct. at 2768. Here, however, the lower court has upheld a statutory construction twice removed from the text. It has affirmed an agency-generated requirement—the control criterion (erroneously assumed by FERC to be mandated under *MTA*)—that acts to disqualify public entities which satisfy the lower court's own regulatory yardstick test under *MTA*. The resulting interpretation of the statute now in effect is so far removed. from its actual language as to render it unrecognizable.

Reduced to its essentials, the decision of the FERC affirmed below looks beyond the language of the statute, "public bodies", and looks beyond the historic definitions of "yardstick competition" and develops new control criteria in a misguided effort to fill in a newly found gap in the statute. But this approach unlawfully extends the statute, a subject addressed in *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617 (1944) (*Addison*):

> Legislation introducing a new system is at best empirical, and not infrequently administration re-

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[14] "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.*

> veals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.

In brief, even assuming that FERC actually has discovered a pragmatic need to redefine either "public bodies" or "yardstick competition", a subject discussed *infra*, the court should not have shown deference to FERC's extension of the statute. It should have reversed FERC, suggesting that it seek legislation to fill in the gaps perceived in the statute.

III. FERC'S CONTROL CRITERION IS NOT THE PRODUCT OF REASONED DECISIONMAKING.

Although the court below found that FERC's public body criteria were not required by the NRA or prior case law, it stated that the agency was not precluded "from adopting standards that it deems essential to effective implementation of the statute it has been directed to administer." 922 F.2d at 81 (14a). FERC, however, never demonstrated that the control criterion it chose was essential or even rationally connected to the administration of the NRA, as the process of reasoned decisionmaking requires. *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Insurance Company*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866 (1983) (*State Farm*).

FERC adopted several public body criteria, three of which are of principal relevance: (1) the ability to serve a substantial portion of the public body's customers' requirements, (2) the ability to foster consumer rate comparisons and (3) operational control of distribution facilities. As to the first, FERC found that Vermont, "unlike the MDAs", met it. *I.D.*, 42 FERC at 65,171 (58a); Opinion No. 329, 48 FERC at 61,472 (96a). Similarly, a 1987 Vermont statute mandating the conspicuous and separate display of

Vermont's retail rates and charges on customer bills[15] (of which FERC took official notice, but arbitrarily refused to consider) satisfies the second criteria.[16] Vermont's argument, therefore centers on the Commission's control criterion.[17]

In its discussion of VDPS, the lower court emphasized the absence of competition between the distribution costs of VDPS and the lessor utilities as the "most compelling" rationale cited by FERC for the imposition of an operational control requirement. 922 F.2d at 85 (21a). Indeed, the court went so far as to suggest that "spurring competition" would be nearly inconceivable in the absence of differing distribution costs. *Id.*[18] That holding, even under

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[15] 30 V.S.A. § 212f (1987).

[16] PASNY's contract with Vermont allows the State to reapply for an allocation of preference power under a 1987 Vermont statute (30 V.S.A. § 211 *et seq.*) if, as a result of the resolution of this case by FERC or the courts, Vermont could qualify as a public body under that statute.

[17] Control and direct responsibility, although nominally listed as separate criteria, are treated in the Commission's order and the lower court's opinion interchangeably. The direct responsibility criterion appears to derive from FERC's interpretation of the Second Circuit's statement in *MTA* that a public body could not supply customers indirectly, *i.e.*, at wholesale, but had to be "directly responsible" for meeting their needs. *MTA*, 796 F.2d at 593 (citing Opinion No. 229). In turn, FERC concluded that to be directly responsible *MTA* requires control of distribution facilities. Vermont refers to both control and direct responsibility with the shorthand "control criterion".

[18] As the court held:

> Simply stated, the Commission concluded that the distribution costs of the lessee public entity and the lessor private utility will always be the same. We find this to be the most compelling argument against the form of leasing arrangement that is before us. If spurring competition is the object of the NRA, it is difficult for us to see how the leasing arrangements at issue advance that fundamental objective.

922 F.2d at 85 (21a).

a deferential standard of review (which is not warranted here), is seriously flawed.

First, the distribution cost test finds no support in the words of the NRA, the legislative history or case law. Although the lower court concluded in *this* case that no competition is possible if the public body and the private utility have the same *distribution* costs (922 F.2d 85 (21a)), the assumption underlying the yardstick principle—first laid out in the earlier *PASNY* decision and expressly referenced by the court—is simply that the public body's "lower competitive *rates*," fueled by "cheap *hydropower*" costs, "will force the private utilities in turn to reduce their *rates*." 922 F.2d at 77 (6-7a) (quoting *PASNY*, 743 F.2d at 105 (emphasis added)). This assumption makes perfect sense even if "the distribution costs of the lessee public entity and the lessor private utility will always be the same." *Id.* at 85 (21a). If distribution costs are equal, public bodies can assuredly translate their "cheap hydropower" into "lower competitive rates." *Id.* at 77 (6a). Those lower rates, in turn, will pressure private utilities to lower their rates. Yardstick competition comes from a comparison of *rates*, not the individual cost components thereof. Indeed, the Commission's determination that a public body can lease the distribution facilities of a private utility (Opinion No. 329, 48 FERC at 61,467 (88a)) and thereby incur most of the same distribution costs, would seem to be a tacit acknowledgement of this point.

Second, if VDPS' leases are defective under the "distribution cost" test, *every* lease will suffer from this defect. Simply put, no private utility could be compelled to lease its facilities at less than cost. And, since the bulk of the lessee's distribution costs will be the costs of the leased facilities (as opposed to the operating costs), there logically would be little difference in the public body's distribution costs, whether it, or the private utility physically operated

those facilities.[19] The FERC test affirmed below would lead to the anomalous result that if VDPS took over operation of the private utilities' distribution systems and incurred *higher* distribution costs in the process—it would qualify as a public body even if, as a result, its rates were *less* competitive. Far from comprising the "most compelling argument against the [VDPS] form of leasing arrangement" (*Id.* at 85 (21a)), the distribution cost test lacks any logical basis.

Third, the lower court's conclusion that competition between public entities and private utilities is not possible unless the public entity controls the operation of a distribution system (in order to control distribution costs) cannot be squared with the lower court's heavy reliance on FERC's purported expertise (*Id.* at 81 (14a)), particularly since FERC itself has reached the opposite conclusion. In a recent FERC case cited to the lower court, VDPS opposed a merger of two private utilities in Vermont on the grounds that the merger was anticompetitive. FERC overruled VDPS' objections, citing VDPS' continuing presence as a retail competitor of those utilities *against VDPS* as a factor supporting FERC's conclusion that the merger was *not* anticompetitive.[20] And, in the case at bar, the

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[19] The lower court and FERC also referred to the fact that VDPS has contracted with private utilities to perform a number of distribution operations typically undertaken by the local utility. 922 F.2d at 84-85 (20-21a). But public bodies, even as FERC defines the term, commonly retain third parties to perform typical distribution operations like meter reading, billing, tree trimming, *etc.* 2609-11A, Vol. IX.

[20] See *Central Vermont Public Service Corporation and Allied Power and Light Company*, 52 FERC ¶ 61,278 at 62,103 (1990). Subsequent to the Commission's order in the *Central Vermont* case, the intervenors in the case below sought to intervene out-of-time in that case—not to take any substantive position on the merger—but solely to urge that FERC "clarify", *i.e.*, retract its finding that VDPS sells power at retail in competition with private utilities. Tellingly, despite the intervenors' invitation, the Commission did not disavow its holding in the first

Commission staff's only witness testified that VDPS provided competition to private utilities at retail for the same reasons given by VDPS' own economic experts. 254A, 312-3A, Vol. I; 585A, Vol. II.

Fourth, the control criterion is itself subject to a number of irreconcilable conflicts that render its application uneven and arbitrary. For example, although FERC states that a public body cannot control distribution facilities if it shares responsibility with a private utility for serving a customer, Opinion No. 329, 48 FERC at 61,467 (89a), it allows industrial customers of a public body, without limit, to take service from "more than one supplier", Opinion No. 329, 48 FERC at 61,467 (89a), thereby both precluding and permitting shared responsibility under the same criterion. Similarly, it requires the public body to control the distribution facilities used to serve its customers, but it excludes "borderline agreements" by a public body—agreements under which the customers of the public body are physically served by distribution facilities controlled by another entity—from the control criterion. Opinion No. 329, 48 FERC at 61,467, 61,468 (88, 89a). Again, it places no limit on the number of public body customers who could be served under such borderline agreements. Nor does FERC ever reconcile why its control criterion applies only to distribution facilities. The Commission's justification for

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Central Vermont case that VDPS is a retail competitor of private utilities in Vermont. Nor could it do so without undercutting its conclusion that the merger was not anticompetitive. Indeed, FERC *reiterated* in the second *Central Vermont* case, that "[VDPS'] role in the market in the State of Vermont was a relevant consideration in examining the impacts of the proposed merger between Central Vermont and Allied." *Central Vermont Public Service Corporation and Allied Power and Light Company*, 53 FERC ¶ 61,204 at 61,818 (1990). Although the Commission purported to issue a "clarification" that VDPS is a "broker acting in the wholesale and retail markets in Vermont", this was no clarification at all. Rather, the Commission's "clarifying" language was transparently intended to obfuscate the contradiction between the two cases without having to disavow conclusions made in either of them.

the criterion,—that such control is necessary to assure "continuity of service"[21]—applies equally to generation and transmission facilities. An interruption in service from any of these facilities would disrupt service continuity.

Fifth, in finding FERC's control rationale "compelling", both FERC and the lower court entirely overlooked the fact that competition in the *sale* of power at retail—like competition in the sale of any product at retail—does not require control over the physical delivery of the product. In the proceedings below, the example was given of the mail order house that relies on UPS to deliver its products to retail customers. 2832-33A, Vol. IX. Indeed, VDPS pointed out that the operational control criterion turns the notion of competition on its head. Under the antitrust laws, for example, an entity is not required to duplicate or condemn essential facilities controlled by its competitor. On the contrary, in the analogous telecommunications context, the refusal by a private utility to provide access to its essential "distribution facilities" has been held to be anticompetitive where the utility "had *complete control* over the local distribution facilities that [its competitor] required." *See, MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1133 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983) (emphasis added).

FERC also has recognized that, in the similarly analogous context of the natural gas industry, competition in the sale of gas is made possible precisely because natural gas pipeline companies—which sell *and* deliver natural gas—have been required to deliver gas sold by their competitors as well. *See, Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1468 (1988). And, in the electric utility industry, FERC has recognized that a power supplier does not need to own or operate facilities in order to compete in the sale of electric

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[21] 922 F.2d at 79 (10a) (citing *I.D.*, 42 FERC at 65,165 (44a)).

energy to which it takes title. *Citizens Power & Light Corporation*, 48 FERC ¶ 61,210 at 61,776 (1989). These arguments—and evidence supporting them (*e.g.*, 151A, 254A, 278A, 313A, Vol. I; 558-561A, 576-583A, Vol. II; 2783-2785A, 2811-2824A, Vol. IX)—were squarely presented to FERC (and the lower court), but never mentioned, let alone given reasoned consideration, by the ALJ or FERC in their decisions, as reasoned decisionmaking requires. *State Farm*, 463 U.S. 29, 43 (1983); *Maryland People's Counsel v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985); *Moraine Pipeline Company v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990).

CONCLUSION

For the reasons set forth herein, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, and upon review of the Record in that court, its judgment be reversed and the cause remanded to it with directions that it reverse the orders of the Federal Energy Regulatory Commission.

Respectfully submitted,

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